LEONG SING

v.

PERUSAHAAN KUARI (MELAKA PINDAH) SDN. BHD. & ANOTHER CASE

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: 11-4-1996]
2 OCTOBER 1996

PARTNERSHIP: *Suits by and against partnerships - Dissolution of partnership - Action against partnership commenced after dissolution - Whether consequential - Date of accrual of cause of action - Whether partnership must exist when cause of action accrued - Subordinate Courts Rules 1980, O. 10 r. 1.*

PARTNERSHIP: *Suits by and against partnerships - Action against firm in firm's name - Whether names of individual partners should be included - Whether tantamount to partners being sued individually.*

PARTNERSHIP: *Suits by and against partnerships - Dissolution of partnership - Plaintiff aware of dissolution - Whether plaintiff has right to choose party against whom he wishes to proceed - Whether necessary to serve summons on outgoing partner to make him liable - Subordinate Courts Rules 1980, O. 10 r. 3(2).*

PARTNERSHIP: *Suits by and against partnerships - Death of partner - Whether necessary to include deceased partner's estate as party to action.*

CIVIL PROCEDURE: *Pleadings - Statement of defence - General or mere denials - Whether sufficient - Effect of general denials - Whether onus of proof shifts to other party.*

CIVIL PROCEDURE: *Pleadings - Statement of claim - Failure to include accrual date of cause of action - Whether defective - Whether other party prejudiced - Whether O. 10 r. 1 of Subordinate Courts Rules 1980 can be complied with notwithstanding defect - Whether affidavit evidence can be considered - Order 14 r. 21(1).*

The appellant was a partnership between two persons. During the subsistence of the partnership, the appellant had made certain purchases from the respondent. The appellant defaulted in making payment but the respondent did not immediately undertake any legal action. Later, the partnership turned into a sole proprietorship when one of the partners withdrew. Two years later, the remaining partner passed away.

Thereafter, the respondent served two letters of demand for the outstanding payment. The respondent also filed a writ against the appellant based on the original name of the partnership and the summons was served on the former partner. The statement of claim, however, did not disclose the date when the cause of action accrued. The appellant then filed its defence, para. 6 of which statement of defence contained a general catch-all defence which read, "... save and except as hereinbefore admitted, each and every allegation in the statement of claim is denied as if the same were set out herein seriatim and specifically traversed." The respondent then applied for the defence to be struck out pursuant to O. 14 r. 21(1) of the Subordinate Courts Rules 1980 ('the SCR'). Without proceeding to trial, the defence was struck out and a consequential order for summary judgment was made.

The appellant appealed on the following grounds: (i) that the action was bad in law not only because the partnership had ceased to exist when the action was commenced but also because the action against the appellant was per its original partnership name and thus not in order; (ii) that the appellant was not served with the summons; (iii) that the former partner was served with the summons although he was not named as a defendant in the action; (iv) that the estate of the deceased partner was not included as a party to the action; (v) that the date when the cause of action occurred was not stipulated in the statement of claim; and (vi) that the appellant's defence was not frivolous and vexatious.

Held:

[1] Order 10 r. 1 of the SCR is very clear and unambiguous. It provides in ringing terms that "... any two or more persons ... may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued." Consequently, whether a partnership exists or otherwise when the suit is lodged is of no consequence, provided it exists at the time the cause of action accrues. In the instant case, therefore, the cessation of the partnership was not a stumbling block to the respondent's action as it was subsequent to the accrual date of the cause of action.

[1a] Although the names of the individual partners were not mentioned, the respondent's action was sustainable as it was tantamount to taking up a suit individually against all those who were partners at the time of the accrual of the cause of action. To merely inscribe the partnership as the defendant without more was in order. Consequently, the respondent's format of instituting the action against the appellant, using the appellant's original name without including the individual partners' names, was proper and in compliance with O. 10 r. 1 of the SCR. A

plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he has set out all their names.

[2] Under O. 10 r. 3(2) of the SCR, if a partnership has, to the knowledge of the plaintiff, been dissolved, a choice is given to the plaintiff to choose the person whom he wishes to make liable. In the instant case, the respondent was aware of the dissolution of the appellant before the commencement of the action; consequently, the respondent had a right to choose the former partner to be made liable. And as the former partner had received the summons, the respondent could proceed with the action.

[3] *The Supreme Court Practice 1995,* Vol. 1, Part 1, p. 1380, para. 81/1/10, states, *inter alia,* that, "Where a person who was a partner at the date of accrual of the cause of action dies before action is brought, it would seem that his executors need not be made parties to the action." Therefore, there was no necessity for the respondent to include the deceased partner's estate as a party to the action.

[4] It is trite law that mere denials or general denials are insufficient. Instead, facts that allegedly make a claim unmaintainable should be specifically pleaded. This is also to prevent opponents from being taken by surprise.

[5] To succeed in forwarding a satisfactory pleading, the respondent had to ensure that all the ingredients and requirements of O. 10 r. 1 of the SCR had been fully complied with. In this regard, the respondent's statement of claim certainly fell short of the requirements of O. 10 r. 1 of the SCR due to the absence of a major requirement, *viz,* the date of accrual of the cause of action. This deficiency could prejudice the appellant as it would be unable to submit a proper defence. Furthermore, O. 14 r. 21(1) of the SCR does not permit the admission of affidavits in considering whether there is a reasonable cause of action.

Per curiam:

[1] The position of a decision which does not emanate from a trial is similar to that of an appeal from a decision of a Registrar of the High Court which ends up with a Judge in chambers (Rules of the High Court 1980, O. 56 r. 1). Cases which go direct to the Judge in chambers on appeal will not only undergo an actual process of rehearing but will be treated differently from cases tried fully in the subordinate Courts. In the instant case, the Court was entitled to go through the rigmarole of an actual

hearing without being curtailed by the arguments canvassed at the lower Court or by any statutory documents.

[Appeal allowed]

Cases referred to:

Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd. [1996] 1 CLJ 241 ***(refd)***

Poh Brothers Sdn. Bhd. (Dahulunya dikenali sebagai Poh Brothers Muar Sdn. Bhd. v. UB. Usahabina Sdn. Bhd. (Rayuan Sivil No. 12-23-1996) ***(refd)***

Western National Bank of City of New York v. Perez, Triana & Co. [1891] 1 QB 304 ***(foll)***

Re Wenham [1900] 2 QB 698 ***(foll)***

Noble Lowndes and Partners (A Firm) v. Hadfields Ltd. [1939] 1 Ch. 569 ***(foll)***

Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co. Sdn. Bhd. [1975] 2 MLJ 115 ***(cit)***

M.K. Varma & Anor. v. K.M. Oli Mohamed [1950] 16 MLJ 80 ***(aff)***

Wigram v. Cox, Sons, Buckley & Co. [1894] 1 QB 792 ***(refd)***

Malayan Banking Bhd. v. Chua Keng t/a New Fortune Enterprise [1991] 3 CLJ 2522 ***(refd)***

Superintendent of Lands and Surveys (4th Div.) & Anor. v. Hamit bin Matusin & Ors. [1994] 3 CLJ 567 ***(refd)***

Warner v. Sampson & Anor. [1959] 1 All ER 120 ***(refd)***

Drammond Jackson v. British Medical Association & Ors. [1970] All ER 1094 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 56 r. 1, O. 77 r. 1

Rules of the Supreme Court 1957 [UK], O. XLVIIIA r. 8(c)

Rules of the Supreme Court [UK], O. 18 r. 19

Subordinate Courts Rules 1980, O. 10 rr. 1, 3(1), (2), O. 14 r. 21(1), 21(2), O. 49 r. 6

Other sources referred to:

Malall's Supreme Court Practice 1983, p. 1080

The Supreme Court Practice 1970, pp. 1101, 1102, para. (a)

The Supreme Court Practice 1995, Vol. 1, Part 1 1380, para. 81/1/10

For the appellant - Hilary D'Cruz; M/s. Bashir & Co.

For the respondent - K.P. Ng; M/s. K.P. Ng & Amardas

JUDGMENT

Suriyadi Halim Omar J:

The appellant-cum-defendant, Leong Sing, was a partnership between two persons namely Teh Peng Lam and Teh Chwee Swi. During the subsistence of the partnership business went along as usual but unfortunately a cause of action accrued on 7 August 1987 when this partnership defaulted in its payment

for items which were bought and delivered from the respondents. Despite that default no legal action was undertaken by the respondents to recover the sum owing which totalled RM16,350.39. On 1 November 1989 that partnership turned into a sole proprietorship when Teh Peng Lam withdrew from the arrangement thus leaving Teh Chwee Swi on his own. On 9 January 1991 Teh Chwee Swi passed away. Subsequent to all those dates and significant events the respondents (plaintiffs) served two letters of demand dated 21 May 1992 and 4 June 1992 for the above said sum but remained unpaid. On 20 June 1992 the respondents filed a writ against Leong Sing, based on the original name of the partnership, followed by the filing of the defence on 18 August 1992. All these facts were not disputed by both parties.

On 25 May 1993 the respondents under O. 14 r. 21(1) of the Subordinate Courts Rules 1980 applied for the defence to be struck out. This rule reads:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any summons or anything in any pleading or in the indorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

For purposes of this appeal the grounds were that of (a), (b) and (c) only. On 16 January 1996 the respondents successfully obtained the order that the defence be struck out with a consequential order of a summary judgment. On 20 January 1996 the appellant filed the notice of appeal stating dissatisfaction with the whole judgment meted out by the Magistrate's Court. On 23 September 1996 I allowed the appeal with costs. The appellant had argued before me that:

(1) the action was bad in law as not only had the partnership ceased to exist when the action was commenced but the litigation against the appellant defendant was per its original name and thus not in order;

(2) the partnership was not even served with the summons;

(3) Teh Peng Lam was instead served with the summons although not named as a defendant in the action;

(4) the estate of Teh Chwee Swi was not included as a party;

(5) the date when the cause of action accrued was not provided in the statement of claim; and

(6) the appellant's defence was not frivolous and vexatious thus deserving the Court's consideration.

Before pursuing with the appeal, to ensure no procedural mistake would be committed along the way, I took the precaution of ascertaining the legal foundation of this appeal. The relevant provision applicable zeroed in on O. 49 r. 6 of the Subordinate Courts Rules 1980 which read:

> Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in chambers from any decision made by the Court other than a decision made after trial.

As this was a decision which did not emanate from a trial the position would be quite similar to that of appeals from decisions of the Registrar of the High Court which end up with the Judge in chambers (O. 56 r. 1 Rules of the High Court 1980). Cases which go direct to the Judge in chambers on appeal not only will undergo a process of actual re-hearing but to be treated differently to that of cases tried fully in the subordinate Courts. This interpretation was clearly laid down by the Federal Court through Edgar Joseph Jr. FCJ in *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd.* [1996] 1 CLJ 241 at p. 248; [1996] 1 AMR 215 at p. 226 when he said:

> With respect, in appeals to a Judge in chambers from the decision of a Registrar of the High Court, the Judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the Subordinate Courts. Such appeals from decisions of the Registrar are by way of an actual re-hearing and the Judge treats the matter as though it comes before him for the first time. The Judge is therefore not confined to the points taken before the Registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply.

In my previous grounds of decision in *Poh Bros. Sdn. Bhd. (Dahulunya dikenali sebagai Poh Bros. Muar Sdn. Bhd.) v. UB. Usahabina Sdn. Bhd*. (Rayuan Sivil No. 12-23-1996) I remarked:

> To detract slightly as to why Edgar Joseph Jr. FCJ had differentiated the treatment to be accorded to those two types of sources I could only detect these reasons. His Lordship in his wisdom must have had in mind when uttering those remarks that an appeal from the subordinate Courts would be heard by an appeal Judge in open Court whilst a decision from the Registrar of the High Court would be heard by a Judge in chambers. Moreover an appeal from the lower Courts is commenced by filing a notice of appeal in Form 140 as provided by O. 49 of the

> Subordinate Courts Rules 1980. The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. After filing that notice of appeal O. 55 of the Rules of the High Court 1980 will come into play whereafter the appellant shall file in the High Court in duplicate a memorandum of appeal and subsequently serving on each respondent that copy of such memorandum together with the record of appeal. In other words the process will be laborious, with the appeal to be confined to the issues in the required documents. With regard to an appeal from the Registrar all that is required is that a notice be submitted in Form 114, requiring attendance before the Judge on a day specified in that notice (O. 56 of the Rules of the High Court 1980). No memorandum of appeal or records of appeal are required that will confine any Counsel's arguments. Looking at the differences in the steps and the requirements it is no surprise that his Lordship Edgar Joseph Jr. FCJ made those comments.

On the above grounds I must, aside from consistency sake, conclude that for purposes of this case I was entitled to go through the rigmarole of an actual hearing without being curtailed by the arguments canvassed at the lower Court or by any statutory documents.

For a better understanding of the sequence of the appeal's arguments, and my stance over them, I shall justify that decision by a process of elimination supported by the relevant explanations.

The action was bad in law as not only had the partnership ceased to exist when the action was commenced but the litigation against the defendant was per its original name and thus not in order – Argument No. 1.

It was not denied that on 20 June 1992 when the statement of claim was filed the partnership had extinguished, by reason not only of the withdrawal of Teh Peng Lam on 1 November 1989 (OPH2 p. 9 RR), but also by the death of Teh Chwee Swi on 1 September 1991. With that scenario prevailing a relevant question that necessitated argument was whether action had been commenced against the correct party and hence enabling this action to be sustainable. It was also argued that the letter dated 1 July 1992 which was part of the Court's document (consented by both parties to be one of the agreed documents), was addressed to a non-existent partnership.

After some consideration despite the attractive argument of the appellant I was convinced that this format of instigating a legal suit was proper and in compliance with O. 10 r. 1. This rule reads:

> Subject to the provisions of any written law, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued.

On this score the argument of the respondents was on solid ground as this rule permitted an action to be taken against that partnership founded on the time "when the cause of action accrued." Therefore whether the partnership was in existence or otherwise when the suit was lodged on 20 June 1992 was of no consequence. The cause of action here was alleged to have accrued on 7 August 1987 which was years before the termination of the partnership or the issuance of the writ by the respondents.

Since the cause of action related to matters of partnership, the said O. 10 r. 1 of the Subordinate Courts Rules 1980 was considered by me, a provision which is *in pari materia* with O. 77 r. 1 of the Rules of the High Court 1980. Aside from these statutory provisions, assistance was also sought from case laws beginning with *Western National Bank of City of New York v. Perez, Triana & Co.* [1891] 1 QB 304 where at p. 314 Lindley LJ said:

> When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names.

The second case significantly worthwhile to refer to is the case of *Re Wenham* [1900] 2 QB 698 which dealt with O. XLVIII, a provision which was partly *in pari materia* with O. 77 of the Rules of the High Court 1980. In this case the decision was appealed against but eventually dismissed. With regard to the above O. XLVIII Rigby LJ had this to say:

> I need only refer to O. XLVIIIA which does not appear to lay down anything new, but to recognise effectually what was well-known law before – that people cannot alter in substance their relations to their creditors on the ground that they have dissolved partnership.

A near similar interpretation was arrived at in *Noble Lowndes and Partners (A Firm) v. Hadfields Ltd.* [1939] 1 Ch. 569 where at p. 512 Farwell J said:

> It is said in the present case that the original plaintiff is non-existent, and on the principle of Russell J's decision a living person cannot be substituted for a firm which never had any existence. In my judgment that case is not applicable here. Order XLVIIIA enables persons carrying on business in partnership to sue or be sued in the firm's name, but that is a rule made for convenience, **and an action by or against a firm notwithstanding the rule remains an action by or against the individual members of the firm**. That appears from the rule itself, which enables the other side to ascertain at once the names and addresses of the individuals. **Such an action remains therefore an action by or against individuals** ... . (Emphasis supplied).

(See the case of *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co. Sdn. Bhd.* [1975] 2 MLJ 115 which followed the above remarks).

Another case in point is *M.K. Varma & Anor. v. K.M. Oli Mohamed* [1950] 16 MLJ 80 where Gordon Smith J maintained that, "the plaintiffs had the alternatives of joining all the partners as plaintiff or of taking advantage of the special procedure by suing in the firm's name." In the current case even though the position was in the reverse where the intitulement regarding the partnership was questioned the above opinion would still be equally applicable *vis-a-vis* the defendants. To reiterate, even though the names of the individuals of the partnership were not mentioned, such an action was possible as it did tantamount to a suit being taken up individually against all those who were partners at the time of the accrual of the cause of action. Therefore to merely inscribe the partnership as the defendant without more was in order.

The next issue I had to consider was whether it was proper for a suit to be instituted in 1992 when by then the partnership had ceased. On this point I had no problems as O. 10 r. 1 of the Subordinate Courts Rules 1980 are very clear and unambiguous. This provision in ringing terms reads that the appellant, "... may ... be sued, in the name of the firm (if any) of which they were partners at the time **when the cause of action accrued** ... ." (Emphasis supplied). At the beginning of the century on this point Wright J in highly accurate and articulate manner when discussing O. XLVIII which was partly *in pari materia* with O. 77 of the Rules of the High Court, in *Re Wenham* (*supra*) commented at p. 700:

> In this case there was a cause of action against two brothers as members of the firm of "Wenham Brothers." After that cause of action had accrued the firm dissolved partnership. Then the creditors who had the cause of action brought their action against the firm, the writ being issued against "Wenham Brothers." If this question had arisen in the year 1881 we might have had to hold, having regard to the judgments of Lord Selborne LC and Cotton LJ in *Ex parte Young, In re Young*[(1)], that the action could not be brought against the firm in the firm's name, so as to bind John Wenham by the judgment, because the partnership had been dissolved before the issue of the writ in that action. But since then O. XLVIIIA[(2)] has been framed for the purpose of meeting the difficulty, and the changes which are effected by the rules of that Order point strongly to the conclusion that it was expressly intended to alter the provisions of the former rules which dealt with the matter, *and to provide a convenient procedure by enabling co-partners to be sued in the name of the firm of which they were co-partners at the time of the accruing of the cause of action, leaving the question of fact, whether a person was a partner when the cause of action accrued, to be decided in the action.* (Emphasis supplied).

On this issue too *Mallal's Supreme Court Practice 1983,* at p. 1082 had this to say:

> **"At the time of the accruing of the cause of action":** These words enable the co-partners in a firm dissolved before action to sue or be sued as a firm provided

> the co-partnership existed at the time the cause of action accrued. (Emphasis provided).

In conclusion under this heading it was proper for the respondent to litigate the case against the appellant using the partnership's name without any inclusion of the individual partners' names. Also, its cessation, was not a stumbling block, so long as the accrual date of the cause of action, was prior to its termination.

The appellant was not served with the summons. Instead Teh Peng Lam, a previous member of the partnership was served with it though not named as a defendant in the action – Arguments 2 and 3.

At the outset on a finding of fact I must confirm that no proper service was carried out on the named defendant (appellant). Of course it would have been an impossible task to do so on the said partnership as even by 1 November 1989 it had already become a sole proprietorship with the remaining member declared dead on 9 January 1991. Instead, as confirmed by para. 7 of the affidavit of one Ong Peng Hai a manager in the respondent's company (p. 4 RR), the summons was served on the ex-partner, i.e. the abovementioned Teh Peng Lam. Not unexpectedly the appellant argued that this service was not in order. The appellant suggested that the proper thing to do was to bring the estate of the dead person and Teh Peng Lam in as co-defendants and everything would be as right as rain.

The relevant provision here as I see it is O. 10 r. 3(2) which reads:

> Where a partnership has, to the knowledge of the plaintiff, been dissolved before an action against the firm is begun, the summons by which the action is begun must be served on every person within the jurisdiction sought to be made liable in the action.

Under O. 10 r. 3(1), on an understanding that the partnership was viable when the summons was issued, the method of service was by serving on any one or more of the partners, or at the principal place of business of the partnership within the jurisdiction on any person having at the time of service the control or management of the business. For the latter situation even if any member were to be abroad the service was deemed to be good. In the second situation as envisaged by the abovesaid O. 10 r. 3(2) where a partnership had dissolved to the knowledge of the plaintiff, a choice was given to the plaintiff, to choose the person whom he wished to be made liable. In this case the unfortunate Teh Peng Lam was the chosen one much to his chagrin.

In the case of *Wigram v. Cox, Sons, Buckley & Co.* [1894] 1 QB 792 Cave J discussed O. XLVIIIA r. 8(c) which reads:

> Rule 8: Where a judgment or order is against a firm, execution may issue ... (c) against any person who has been individually served, as a partner, with the writ of summons and has failed to appear ... . But except as against any property of the partnership, a judgment against a firm shall not render liable, release, or otherwise affect any member thereof who ... has not appeared to the writ unless he has been made a party to the action.

On this point at p. 795 his Lordship said:

> Where there has been a dissolution to the knowledge of the plaintiff, he cannot make an outgoing partner liable, unless he serves the writ of summons upon him. Here the plaintiff, although he knew when he commenced his action that the appellant was no longer a member of the firm, chose, as he had a right to do, to issue his writ against the firm in their firm's name, and chose also not to serve the appellant who had gone out. Therefore, as there has been no service, either actual or constructive, upon the appellant, the plaintiff cannot proceed against him under r. 8.

The *ratio decidendi* in that case was that the appeal was allowed as there had been no service on the appellant either actual or constructive and as such the plaintiff could not proceed to make him liable. In the previously mentioned case of *Re Wenham* (*supra*) Wright J when discussing O. XLVIIIA (r. 8) (endorsed by the Court of Appeal) agreed that if a person had been served with the writ of summons, execution could be issued on him. For purposes of understanding *Re Wenham* better, suffice for me to say that an action was filed against the partnership without naming the individual partners, based on a cause of action which accrued prior to its dissolution **(like the current case).** John Wenham was served with a writ of summons and he failed to appear before the Court. Wright J held him liable as he not only was served with the writ but also came within the scope of the relevant Order.

To conclude on this point for purposes of this current case, as the respondent was aware of the dissolution before the commencement of the case, the respondent was within its rights to select Teh Peng Lam to be made liable. For purposes of this case too as Teh Peng Lam had positively admitted receiving the summons receiving the summons his fate was sealed thus enabling the respondent to proceed with the matter.

The estate of Teh Chwee Swi was not included as a party (argument 4)

On this point I seek the assistance of *Mallal's Supreme Court Practice 1983*, at p. 1080 which is very revealing. It reads:

> Deceased Partner: The death of a partner operates as a dissolution ... . When a partner dies ... before action is brought against the firm, judgment can only be obtained against the firm which will bind the surviving partners and enforced

> against them and the partnership assets. The dead man is not a party to the action, so far as his private estate is concerned, for a dead man cannot be sued, though the legal representative of a dead man can be sued in a proper case.

To complete this issue, reference was made to *The Supreme Court Practice 1995*, Vol. 1, Part 1 1380, para. 81/1/10, which reads:

> Where a partner dies before action, and the action is brought against the firm alone in the firm's name, the deceased partner is not a party to the action at all so far as his private estate is concerned ... (*Re Shephard* [1890] 43 Ch. D. 131). Where a person who was a partner at the date of accrual of the cause of action dies before action brought, it would seem that his executors need not be made parties to the action.

To conclude the respondents could have made the deceased's estate similarly liable but chose not to do so as it was unnecessary. On that basis I had to reject the appellant's arguments that there was a necessity in this case to rope in Teh Chwee Swi's estate and to make the deceased's estate equally liable.

The date when the cause of action accrued was not provided in the statement of claim and the appellant's defence was not frivolous and vexatious thus deserving the Court's consideration – Arguments 5 and 6.

Under para. 6 of the statement of defence was a bare statement which when translated into English reads, "save and except as hereinbefore admitted each and every allegation in the statement of claim is denied as if the same were set out herein seriatim and specifically traversed." This was a catch-all defence which was exceedingly general in nature purposefully included to cover potential unrebutted allegations. It is trite law that mere denials or general denials are insufficient and must instead specifically plead facts which allegedly make a claim unmaintainable and also to prevent opponents from being taken by surprise (see *Malayan Banking Bhd. v. Chua Keng Leng t/a New Fortune Enterprise* [1991] 3 CLJ 2522; *Superintendent of Lands and Surveys (4th Div.) & Anor. v. Hamit bin Matusin & Ors.* [1994] 3 CLJ 597; [1994] 3 MLJ 185). Therefore what value was I to confer on this bare statement which on the face of it was ineffective? To answer this I sought solace from the case of *Warner v. Sampson & Anor.* [1959] 1 All ER 120 where Lord Denning at p. 123 discussed that general traverse. He concluded that the general denial, "does no more than put the plaintiff to prove" – which meant that the onus of proof had thus shifted to the other party making it encumbent upon the latter to re-shift that burden. On that perimeter as the appellant had included the general traverse, that meant the onus of proof had thus shifted to the respondent to answer. Aside from this onerous duty of shifting the onus of proof, the respondent who was also the plaintiff was simultaneously lumbered

with the burden of proof, a duty which never shifts. For purposes of this case as the proverbial ball had rolled into the court of the respondent, the latter thus had to convince the Court that the statement of claim was satisfactory. To succeed in forwarding a satisfactory pleading the respondent had to ensure that all the ingredients and the requirements of O. 10 r. 1 of the Subordinate Courts Rules 1980 had been fully complied with. Having perused the contents, the statement of claim certainly fell short of the requirements of O. 10 r. 1 due to the absence of a major ingredient, namely the date when the cause of action accrued. Aside from the respondent being unable to identify the relevant date in the statement of claim that defect would also prejudice the appellant as they would be unable to submit a proper defence. In a manner of speaking, the statement of claim within its own sub-structure had already germinated the seed of its own destruction, which could not be rectified unless amended. Unfortunately the respondent had not done that. Since the respondent had not been able to shift the onus of proof there would thus be no necessity for the appellant to reply. It is trite law that the burden is always onerous on any applicant before succeeding in any striking out action. A mockery of the law would certainly ensue if the applicant were to be successful, when the very foundation of his case was ridden with weaknesses, deserving a dismissal instead.

As to whether I should seek out the assistance of other documents *viz*., the affidavits, to cover the defects of the statement of claim as implored by the respondent, the case of *Drammond Jackson v. British Medical Association and Ors.* [1970] All ER 1094 is illuminating especially the summary under "Held" which reads:

> Held ... the summary power to strike out a pleading for failure to disclose a reasonable cause of action was one which should be exercised only in plain and obvious cases, where the alleged cause of action, **on consideration only of the allegations in the pleading, was certain to fail**. (Emphasis provided).

For purposes of clarification I pursued further and in the process was impressed by the discussion of Lord Pearson at p. 1101 over practices of Courts compiled in *The Supreme Court Practice 1970* in particular the notes under RSC O. 18 r. 19. His Lordship at p. 1102 para. (a) when discussing the practice by which the Courts have approached the question whether a statement of claim disclosed any reasonable cause of action summarised as follows:

> ... Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action **when there is only the statement of claim without any other pleadings and without any evidence at all**. (Emphasis provided).

Bearing in mind O. 14 r. 21(2) did not permit the infusion of affidavits for my consideration before deciding whether there was a reasonable cause of action, I stopped there, I concluded that without the affidavits to beef up the respondent's case the statement of claim was defective. Since that was the unenviable position of the respondent that meant the latter would invariably fail to prove that the defence was plainly and obviously unsustainable. As the first obstacle *viz.*, its own pleadings was blemished, the Magistrate thus should not have struck out the statement of defence. On the same argument as above, as I considered the chances of the respondent over the other sub-headings being successful as being highly remote too, I thus allowed the appeal.

Reported by S. Puvan